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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 762

ROY E. CRUMMER, HEWEN A. LASSETER, COURTNEY S. TURNER, WILLIAM J. MEREDITH, JAMES G. MARTIN, VERNON T. MCCOMBS, MARJORIE SHOCKLEY, HERBERT MOON, ROY F. PRESTON, CARL A. MORAWITZ, R. E. CRUMMER & COMPANY, A CORPORATION, AND THE CRUMMER COMPANY, A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 161–171) is reported at 151 F. 2d 958.

JURISDICTION

The judgment of the circuit court of appeals was entered November 2, 1945 (R. 171–172), and a petition for rehearing was denied November 19,

1945, one judge dissenting, without opinion (R. 184). The petition for a writ of certiorari was filed January 19, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.[1]

QUESTIONS PRESENTED

1. Whether the scheme to defraud alleged in the indictment is set forth with sufficient particularity, completeness, and clarity to enable petitioners to prepare their defense.

2. Whether the indictment is duplicitous as alleging distinct schemes to defraud.

3. Whether the mailings alleged in the indictment show on their face that they were not in furtherance of the scheme to defraud.

4. Whether the circuit court of appeals erred in reversing the judgment of the district court as to petitioner The Crummer Company on count 8.

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[1] As the petition seeks to review a judgment of the circuit court of appeals entered pursuant to an appeal by the Government under the Criminal Appeals Act, as amended (see footnote 2, *infra*, p. 4), it does not involve a criminal proceeding in which there has been a verdict, finding of guilt, or plea of guilty; consequently, it would seem that the applicable period for applying for certiorari is the three-month period allowed by Section 8 (a) of the Act of February 13, 1925, as amended (28 U. S. C. 350), and not the thirty-day period prescribed in Rule XI of the Rules in Criminal Cases. Cf. *United States ex rel. Coy* v. *United States*, 316 U. S. 342.

STATUTE INVOLVED

The pertinent provisions of Section 215 of the Criminal Code, the mail fraud statute (18 U. S. C. 338), are as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction * * * any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

A twelve-count indictment (R. 1–52), charging use of the mails in execution of a scheme to de-

fraud, was returned against petitioners in the United States District Court for the District of Kansas on August 3, 1944. On demurrers (R. 52–64) all counts were held defective as to all petitioners on the ground "that the indictment * * * is indefinite, uncertain and inconsistent and does not sufficiently advise the defendants, or any of them, of the nature of the charge attempted to be alleged against them, or any of them." As to petitioner The Crummer Company, all counts except count 9 were held defective on the additional ground that "the facts stated therein are alleged to have occurred before the defendant, The Crummer Company, is alleged in the indictment to have become a party to the alleged scheme to defraud." (R. 64–65; see also R. 158.) On appeal by the United States to the Circuit Court of Appeals for the Tenth Circuit,[2] the judgment of the district court as to all petitioners except The Crummer Company was reversed. As to The Crummer Company, the judgment of the district court was reversed as to counts 8 and 9 and affirmed as to all other counts, the court below holding that in respect of count 8,

[2] The Criminal Appeals Act, as amended by the Act of May 9, 1942, c. 295, § 1, 56 Stat. 271 (18 U. S. C., Supp. IV, 682), permits, *inter alia*, an appeal to the circuit court of appeals from a judgment sustaining a demurrer to an indictment, except where the judgment "is based upon the invalidity or construction of the statute upon which the indictment * * * is founded."

as well as count 9, the mailing alleged occurred subsequent to the time the company was organized and came into existence. (R. 161–172.) The court below thus held counts 8 and 9 good as against The Crummer Company, and all counts sufficient as against the remaining petitioners.[3]

Since petitioners contend, *inter alia*, that the indictment is insufficient to charge a fraudulent scheme, we summarize here the allegations in that respect as set forth in count 1 and incorporated by reference in the remaining counts.

It is alleged at the outset that from on or about January 1, 1931, until the date the indictment was returned, petitioners devised and intended to de-

[3] As stated by the circuit court of appeals (R. 166), "The grounds of demurrers were broadly that the indictment and each count thereof was vague, indefinite, ambiguous, and uncertain; that it failed to allege facts sufficient to inform the defendants of the nature of the charges and accusations; that it was duplicitous; and that none of the letters or writings charged to have been sent through the mails was designed, calculated, or proposed to execute the scheme." The district court sustained the demurrers as to all defendants solely on the ground that the indictment is indefinite, uncertain, and inconsistent, and does not sufficiently advise petitioners of the nature of the charge attempted to be alleged against them (R. 65), and did not rule on the other alleged defects urged in the demurrers. The appellate court, however, held not only that "the indictment and each count thereof charged the essential elements of the offense with sufficient fullness, clarity, and particularity" (R. 169), but also that there was no duplicity, and that it did not affirmatively appear that the letters allegedly mailed were not in furtherance of the fraudulent scheme charged (R. 170–171).

vise a scheme to defraud 24 named individuals, corporations, and institutions, and others unknown to the grand jury, who were desirous of recovering their money and property theretofore invested in the municipal bonds and other securities of the City of Panama City, Florida (R. 2). The allegations as to the details of the scheme are as follows:

In 1931 and thereafter, Panama City, Florida, was in default on its municipal bonds and interest obligations. On or about May 1, 1931, petitioners organized a Bondholders' Protective Committee, pursuant to an agreement which provided that holders of securities designated by the committee might become parties to the agreement by depositing their securities with the Brown-Crummer Investment Company (hereinafter called Brown-Crummer Co.), or any of its designated agents. (R. 3; Par. 2.) On or about September 1, 1931, petitioners amended this agreement to provide that the depositing of a security by a bondholder would constitute a complete assignment and conveyance thereof to the committee. Petitioners withheld from the investors the terms of this agreement. (R. 3; Par. 2.)

At all times hereinafter mentioned, the committee was completely controlled and dominated by petitioners, as were also the three corporations through which petitioners conducted their operations (R. 2–4; Pars. 1 to 4, incl.). These corporations were Brown-Crummer Co., R. E. Crummer

& Co. (organized by petitioners in 1934) and The Crummer Co. (organized by petitioners in 1942), all of which dealt in municipal bonds (R. 3–4; Pars. 3, 4).

Petitioners proceeded to obtain the deposit of the Panama City bonds and past due interest obligations from the owners thereof under powers of attorney (R. 4–5; Par. 5), falsely representing to the depositors that they would collect for the benefit of the latter amounts due thereon at a cost of 5% on principal and 10% on interest collected (R. 9; Par. 11E).

Subsequently, petitioners involved the bonds and interest obligations thus obtained in litigation against Panama City in the Federal District Court for the Northern District of Florida, and recovered judgments thereon in two actions, Cause No. 160 and Cause No. 26, both styled *W. J. Meredith, et al.* v. *Panama City* (R. 5; Par. 6). Thereafter, petitioners deliberately withheld from the owners information concerning the judgments and the status of their securities which had become merged in the judgments (R. 4–5, 9; Pars. 5, 6 and 11E).

In order to convert to their own use and benefit the monies and other property obtained, petitioners from time to time falsely represented to their customers, including those who had signed the powers of attorney and had deposited with petitioners their bonds, coupons and claims for

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interest thereon which were merged by petitioners into judgments (R. 7; Par. 11), that Panama City could not pay the original coupon rate of 6% without impairing its refunding program (R. 7–8; Par. 11–A) and that the officials of Panama City were making funds available to cover liquidation, at 2%, of defaulted 5%, 6% and 7% coupons and accrued interest up to July 1, 1937 (R. 8; Par. 11–B), at 3% from July 1, 1937, to July 1, 1939 (R. 8; Par. 11–C), and again at 3% from July 1, 1939 to January 1, 1941 (R. 8–9; Par. 11–D). Pursuant to temporary representation agreements and extensions thereof, which petitioners obtained from their customers (R. 4–5; Par. 5), petitioners paid off these interest claims of their customers at the compromise rates of 2% and 3%, as heretofore noted, fraudulently representing that these settlements were being made by Panama City, whereas in fact, petitioners provided the money themselves (R. 8–9; Pars 11–B, C and D), and actually collected from the city in cash and new refunding bonds (dated January 1, 1942), pursuant to the terms of the refunding agreement (dated May 22, 1942), the full amount of these claims that had been merged into the judgments previously mentioned (R. 6–7, 9; Pars. 9 and 11–E).

In 1939, petitioners were able to secure from bondholders control over a large number of Panama City bonds by requesting their deposit for the pretended purpose of having interest payments

endorsed thereon in connection with an exchange of securities which defendants falsely represented the municipality to be effecting. Actually, it was unnecessary for bondholders to make these deposits, since the city was not effecting any exchange that year and no interest payments were being endorsed on said bonds (R. 10; Par. 11–G).

In Cause No. 160 petitioners obtained a judgment for $247,480.94, on which they collected $75,643.20 in cash and $241,605.55 in new refunding bonds (R. 9; Par. 11–E). The $241,605.55 in new refunding bonds was obtained pursuant to the agreement entered into by petitioners with Panama City officials on or about May 22, 1942, which provided for a refunding of the "outstanding indebtedness" of Panama City into new bonds, dated January 1, 1942, and due January 1, 1972, and bearing interest at the rate of 4% per annum (R. 6–7; Par. 9). Petitioners converted to their own use and benefit a large part of the cash and new refunding bonds thus obtained without accounting therefor, and without disclosing to the bondholders information concerning the judgment and collections made thereon (R. 9; Par. 11–E). Pursuant to the terms of the aforesaid refunding agreement, large amounts of these new refunding bonds were also collected on the judgment in Cause No. 26, a part of which petitioners fraudulently converted to their own use and benefit (R. 5, 6–7, 8–9; Pars. 6, 9, 11–B, 11–C, 11–D, and 11–E).

To induce the bondholders to part with their Panama City holdings, as previously described, petitioners, operating through Brown-Crummer Co. and R. E. Crummer and Co., conducted a campaign of misrepresentation and non-disclosure of relevant information by means of pamphlets, letters, circular letters, advertisements, and other writings, and by oral communications from themselves and their agents. By these means petitioners made numerous false and fraudulent statements and representations concerning the business of the above named companies, their assistance to bondholders in collecting the overdue obligations of Panama City, and their efforts and intentions regarding an early refinancing of the obligations of this municipality. (R. 5–6; Par. 7.) In addition, petitioners retained a staff of salesmen and agents to secure, through close personal contact, the trust and confidence of the bondholders, and thereafter, by false statements and recommendations, to obtain for petitioners the custody and control of their bonds and interest claims (R. 6; Par. 8). Throughout the entire scheme, petitioners falsely represented and pretended that they were following a policy of protecting their customers' interests, when in fact they did not intend to, nor did they ever, follow such a policy (R. 9; Par. 11–F).

The offenses separately charged in the twelve counts of the indictment are that for the purpose of executing and attempting to execute the fore-

going scheme petitioners placed and caused to be placed in the United States mails, to be sent and delivered by the post office establishment according to directions thereon, certain letters and other writings specifically described in the several counts.

ARGUMENT

1. Despite petitioners' attack upon the principle (Pet. 2–3, 17, 21–28), it is firmly established that "the gist of the offense [under the mail fraud statute] is the use of the mails and the scheme to defraud need not be set forth with such precision as if it were the gist of the offense." *Leche* v. *United States,* 118 F. 2d 246, 247 (C. C. A. 5), certiorari denied, 314 U. S. 617. See also *Rude* v. *United States,* 74 F. 2d 673, 675 (C. C. A. 10), and cases cited; *Worthington* v. *United States,* 64 F. 2d 936, 938 (C. C. A. 7), and cases cited. We do not dispute, of course, that the scheme to defraud is an essential element of the offense and that it must be alleged "with all such particulars as are essential to constitute the scheme or artifice, and to acquaint [the defendant] with what he must meet on the trial." *United States* v. *Hess,* 124 U. S. 483, 486. See also *Worthington* v. *United States, supra.* We submit that, contrary to petitioners' contention (Pet. 28–33), the indictment here satisfies these requirements.

As the court below stated (R. 167), "in determining the sufficiency of an indictment challenged

by demurrer for being objectionably vague, indefinite, ambiguous, and uncertain, the whole thereof must be taken into consideration. Paragraphs or other parts are not to be segregated, set apart, and viewed alone without reference to other pertinent parts. All relevant parts must be brought into focus and considered in their totality." A careful consideration of the instant indictment as a whole discloses that the scheme charged was for petitioners to obtain control, as purported fiduciaries, of Panama City past due bonds and interest claims from the public holders thereof, thereafter to acquire ownership of the bondholders' interest claims for substantially less than their face amount by means of false representations and nondisclosure of facts, and, finally, after merging the bonds and interest claims into judgment and collecting thereon in full from the city, to convert fraudulently to petitioners' own use and benefit a substantial portion of the ultimate recovery. The allegations of the indictment pertaining to each of these elements of the scheme sufficiently apprise petitioners of the details thereof to enable them to prepare their defense.

Obtaining control.—This part of the scheme is alleged in the introductory paragraph and paragraphs 1 through 8, 11E, 11F, and 11G of count 1 (R. 2–6, 9–10). These paragraphs name individual bondholders and describe the bondholders as a class which was to be defrauded (R. 1–2), and allege that petitioners formed, dominated, and

controlled a bondholders' committee and various named corporations (R. 2–4) and hired a staff of salesmen and agents, all for the purpose of obtaining custody and control of the bonds and interest claims (R. 6). The various documents which petitioners prepared and used to obtain custody and control of the bonds and interest claims, including a bondholders' committee agreement and an amendment thereto (R. 3), powers of attorney, and temporary representation agreements and extensions thereof (R. 4–5), are designated, as are the various false and fraudlent representations, promises, and high-pressure devices by which petitioners obtained control of the bonds and interest claims, upon the pretense that such control would be exercised as representatives of the bondholders and to protect their interests (R. 5–6, 8–10).

Acquiring ownership of bondholders' interest claims for substantially less than their face amount by false representations and nondisclosure of facts.—This part of the scheme is alleged in paragraphs 11, 11A, 11B, 11C, and 11D of count 1 (R. 7–9). It is charged, in substance, that petitioners employed the pressure tactic of representing that Panama City could not pay the stipulated coupon interest rate without crippling its refunding program (R. 7–8) and at various times falsely represented that Panama City was making available funds to liquidate at 2% and later 3% defaulted interest coupons of 5%, 6%, and 7%, and

accrued interest. In fact, however, as is averred in these paragraphs, payment of the full coupon rate had no relation to the City's refunding program, and the funds supplied to liquidate the coupons were being provided, not by the City, but by petitioners. (R. 8–9.)

Converting to petitioners' own use a substantial portion of the amounts collected on the judgments obtained on the bonds and interest claims.—Paragraphs 5, 6, 7, 9, 10, and 11E of count 1 (R. 4–7, 9) set forth the charges relating to the culmination of the scheme to defraud the bondholders. Petitioners are therein charged with obtaining two judgments against Panama City on the bonds and interest claims committed to their custody and control, and collecting thereon large sums of money and refunding bonds of the City, converting a large part thereof to their own use and benefit (R. 4–6). It is averred that petitioners had represented that they would act for the bondholders "in any legal actions" for 5% of amounts collected on principal and 10% of amounts collected on interest, and, in this connection, it is further alleged that they withheld from the bondholders information concerning their collection of money and refunding bonds and refused to account to them therefor (R. 9). The suits in which the judgments were obtained are identified by case titles, numbers, and the name of the court (R. 5). The details of the collection on one of the judgments are given (R. 9). It is emphasized that

petitioners withheld information from the bondholders as to the status, value, and disposition of their bonds and interest claims, i. e., the obtaining of judgments and collections thereon (R. 5); that they misrepresented to the bondholders the facts concerning petitioners' negotiations with the Panama City officials for payment of their bond and interest claims; and that they ultimately converted to their own use and benefit a large part of the money and property to which investors were entitled (R. 7–10).

Petitioners' objections to the sufficiency of the indictment go merely to evidentiary details which, of course, are not required to be alleged; and, moreover, the allegations are not deficient in the respects which petitioners claim. Thus, petitioners assert that there is no description of the securities which were the object of the fraudulent scheme (Pet. 6–7, 28), and complain that therefore an acquittal on this indictment will be no bar to a subsequent prosecution on a second indictment naming a specific series of Panama City bonds and the persons defrauded, "but relying upon and pleading *different* letters and thus a different use of the mails" (Pet. 29). However, a different use of the mails would be punishable as a separate offense,[4] regardless of whether

[4] *In re Henry*, 123 U. S. 372; *Bozel* v. *United States*, 139 F. 2d 153 (C. C. A. 6), certiorari denied, 321 U. S. 800, rehearing denied, 322 U. S. 768; *Becker* v. *United States*, 91 F. 2d 550 (C. C. A. 9); *Stumbo* v. *United States*, 90 F. 2d

the same or a different scheme was relied upon, and petitioners would not be entitled to plead former jeopardy. Moreover, we think that reference to the securities in question as the "past due Panama City bonds and accrued interest thereon" (R. 4–5), which were involved by petitioners in litigation in "Cause No. 160 and Cause No. 26, both styled *W. J. Meredith, et al.* v. *Panama City,* in the United States District Court for the Northern District of Florida, Marianna Division" (R. 5), is more than adequate for petitioners' purposes in preparing their defense.

As petitioners state (Pet. 28), it is not affirmatively alleged that they had no interest in the bonds or coupons involved in the judgments; but the indictment charges (R. 5) that the scheme contemplated fraudulent conversion to petitioners' own use of monies and refunding bonds (proceeds from collection of the judgments) rightfully belonging to the persons to be defrauded,[8] thus alleging negatively that petitioners were not the sole and rightful owners of the securities.

Petitioners also claim (Pet. 8, 30–31) that no facts are averred to substantiate the allegation that the powers of attorney and representations were obtained fraudulently. That these docu-

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828 (C. C. A. 6), certiorari denied, 302 U. S. 755; *Spirou* v. *United States,* 24 F. 2d 796 (C. C. A. 2), certiorari denied, 277 U. S. 596.

[8] It is not apparent wherein the failure to specify the exact amount misappropriated (see Pet. 28) is significant.

ments were obtained fraudulently, however, is clearly implied in the allegations (R. 4–5) that it was part of the scheme in obtaining them, together with past due bonds and accrued interest thereon and past due interest coupons, to convert the interest obligations to petitioners' own use, to the loss and injury of the persons to be defrauded.

The part to be played by the Bondholders' Protective Committee is claimed to be insufficiently set forth (Pet. 7–8, 29–30). The fair import of the allegations in this regard is, we submit, that petitioners planned, through their complete domination and control of the committee and of the named corporations (R. 2–3, 3–4) (which were organized to deal, *inter alia,* in Panama City municipal obligations), to get control of the bonds and interest claims and to withhold from investors the extent to which, under the committee agreement, the investors had surrendered their rights when they deposited their securities with the corporations (R. 3). The substance of the agreement, and the information withheld and the length of time the committee was used to further the scheme and the time when it was abandoned in favor of other devices employed to gain control of the bonds and interest claims, would constitute evidentiary matter, which need not be supplied by an indictment.[6]

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[6] That the committee played an important part in the scheme is indicated in petitioners' letter of June 12, 1942 (R. 30–35), wherein the committee was referred to as the

Contrary to petitioners' assertion (Pet. 10), the indictment does set forth sufficiently the connection between the refunding agreement and the bonds involved in the earlier litigation in the Florida federal court. Paragraph 6 of count 1 (R. 5), after setting forth the reduction by petitioners of the past due bonds and interest coupons to judgments, states that petitioners "did collect from Panama City large sums of money and new refunding bonds" on account of both judgments. And the refunding program of 1942 (R. 6–7) is the only one mentioned in the indictment.

The allegations in paragraph 11B, 11C, and 11D (R. 8–9), to the effect that petitioners represented to the defrauded persons that the City was advancing funds to liquidate at 2% and 3% the defaulted 5%, 6% and 7% interest coupons, when, as a matter of fact, petitioners had provided the funds themselves, are claimed (Pet. 11) to be inconsistent with the letter of June 12, 1942, reproduced in count six (R. 30–35), wherein petitioners' purchase of the accrued interest obligations is disclosed to their investors. But there is nothing inconsistent between (1) an allegation that petitioners, in obtaining control of the interest obligations at compromise figures, pretended that the City was liquidating the coupons and concealed the fact that they were acquiring them with their

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"representative of holders owning approximately $500,000.00 par value of such [Panama City] bonds."

own funds, and (2) subsequent statements in the aforementioned letters which, in referring to a *fait accompli,* note that these interest obligations had theretofore been "purchased" by petitioners. The proof may show that these letters were intended as a "foil to parry the charge of fraud in case of prosecution,"[7] or to facilitate the final step of fraudulently converting to petitioners' own use the refunding bonds which the investors were entitled to receive from the City.

It is manifest, we believe, that the scheme to defraud is set forth with sufficient particularity to inform petitioners of the nature of the offense charged and to enable them to prepare their defense; and no more is required under the principles established by *United States* v. *Hess,* 124 U. S. 483, upon which petitioners rely. As this Court has said, "While the rules of criminal pleading require that the accused shall be fully apprised of the charge made against him, it should, after all, be borne in mind that the object of criminal proceedings is to convict the guilty, as well as to shield the innocent, and no impracticable standards of particularity should be set up, whereby the government may be entrapped into making allegations which it would be impossible

[7] See *Freeman* v. *United States,* 244 Fed. 1, 13 (C. C. A. 7). Similarly, the offer by petitioners in the same letter (R. 34) to resell the coupons to the bondholders at the price previously paid by petitioners, provided that the bondholders would pay "an expense charge" of $120 for each $1,000 bond, may be proved to have been made to cover up the fraud.

to prove." *Evans* v. *United States,* 153 U. S. 584, 590. "The defendant is entitled to a formal and substantial statement of the grounds upon which he is questioned, but not to such strictness in averment as might defeat the ends of justice." *United States* v. *Simmons,* 96 U. S. 360, 364. The deficiencies claimed to exist here in charging the scheme constitute matters of time, place, and circumstances which are not essential to an indictment, but fall rather within the scope of a bill of particulars which the trial judge, in his discretion, might require the Government to supply. *Glasser* v. *United States,* 315 U. S. 60, 66.

2. Petitioners contend that the indictment is duplicitous because "the scheme alleged here could not have been, as this indictment undertakes to charge, a unitary scheme conceived on January 1, 1931" (Pet. 15, 35–36). However, petitioners confuse the scheme to defraud with the means by which it was to be carried out.[8] The alleged ulti-

[8] It was not essential that when the artifice was devised the schemers should have worked out all of the details of its execution; nor does the recital in the indictment of some of the subsequent developments render the pleading duplicitous. In considering the sufficiency of the indictment the scheme to defraud and the means by which it was to be carried out must be distinguished." *Muench* v. *United States,* 96 F. 2d 332, 335 (C. C. A. 8). See also *Weiss* v. *United States,* 122 F. 2d 675, 680–681, certiorari denied, 314 U. S. 687; *Leche* v. *United States,* 118 F. 2d 246, 247 (C. C. A. 5), certiorari denied, 314 U. S. 617; *Van Riper et al.* v. *United States,* 13 F. 2d 961, 964 (C. C. A. 2), certiorari denied *sub nom. Ackerson* v. *United States,* 273 U. S. 702.

mate purpose in gaining possession and control of the defaulted bonds and interest coupons was wrongfully to convert proceeds therefrom to petitioners' own use. The claims were reduced to judgments, and when, after ten years of negotiations, as summarized in petitioners' circular letter of June 12, 1942, to investors (R. 30–35), a refunding agreement was finally entered into with the City, petitioners were in a position to collect on the judgments and attain their original object to the extent of wrongfully converting, as charged in the indictment (R. 5), a substantial portion of the proceeds to their own use.

3. Petitioners also claim (Pet. 13–15) that the letters alleged to have been mailed for the purpose of executing or attempting to execute the scheme to defraud "show on their face that they could not have been in execution of any scheme" (Pet. 13). But the fact that the letters in counts 2, 3, 4, 7, and 8 proposed to pay defaulted 1941 interest coupons at the original 6% rate, or that the letter in count 1 related only to the principal of the investor's bond, in no way contradicts the allegations as to the scheme to defraud investors on their defaulted coupons of 1937 through 1940. "The indictment alleged that the letters were caused to be mailed in furtherance of the scheme, and whether or not this was true was a question of fact for the jury." *Muench* v. *United States,*

96 F. 2d 332, 336 (C. C. A. 8). For instance, it may well appear at the trial that the remittance to the investor mentioned in the letters covered by counts 2, 10, and 11 did not represent the full value of the investor's claim against the City, since it did not include interest on the judgment obtained. As to others, it may appear that they were for a "lulling" purpose, sent so "that further frauds which are part of the scheme may be perpetrated." *Kann* v. *United States,* 323 U. S. 88, 94–95.[9]

4. The court below held only counts 8 and 9 good as against the petitioner The Crummer Company, since, as to all other counts, the letters alleged therein to have been mailed in furtherance of the scheme were mailed prior to the date the Company is alleged to have been organized (R. 171). Petitioner claims that this constitutes error as to count 8, inasmuch as the United States, as appellant in the circuit court of appeals, expressly did "not challenge" (R. 192) the district court's finding that only count 9 was valid on this score

[9] Paragraph 11 of count 1 recites that the letters were sent through the mails "in order to induce the persons to be defrauded * * * to part with their Panama City bonds and interest obligations * * *, and in order to lull the said persons to be defrauded into a false sense of security, and in order to enable the defendants to convert to their own use and benefit the monies and other valuable property of the persons to be defrauded * * * " (R. 7).

as against the Company. Nevertheless, the Government's appeal embraced The Crummer Company insofar at least as the indictment was held to be indefinite, etc. (R. 65–68; particularly the citation, R. 67–68). The authorities cited by petitioner do not show any lack of power in the circuit court of appeals to correct what it considered to be error, and since the letter in count 8 was allegedly mailed on or about December 17, 1942 (R. 42), and The Crummer Company was allegedly organized on or about November 10, 1942 (R. 4), the district court's conclusion as to count 8 was at least questionable.[10]

CONCLUSION

The decision of the circuit court of appeals is correct, and no conflict of decisions or important question of law is involved. It is respectfully

[10] That a federal appellate court may *sua sponte* consider plain error prejudicial to the accused, and resulting in a miscarriage of justice, although neither raised in the trial court nor assigned as error, is well established. *Wiborg* v. *United States*, 163 U. S. 632, 658; *Gros* v. *United States*, 136 F. 2d 878, 880–881 (C. C. A. 9); *Banning* v. *United States*, 130 F. 2d 330, 339 (C. C. A. 6), certiorari denied, 317 U. S. 695. And since "the object of criminal proceedings is to convict the guilty, as well as to shield the innocent" (*Evans* v. *United States*, 153 U. S. 584, 590), no reason appears, and none is suggested by petitioner, why the court below should not have exercised this prerogative for the benefit of the Government by correcting what it apparently considered plain error in the trial court's invalidation of count 8.

submitted, therefore, that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.

THERON L. CAUDLE,
Assistant Attorney General.

ROBERT S. ERDAHL,
ANDREW F. OEHMANN,
Attorneys.

FEBRUARY 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946